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In The

Supreme Court of the United States

October Term 1998

SEAGATE TECHNOLOGY, INC.,

Petitioner,

v.

MAUDIE BEAIRD, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Society for Human Resource Management ("SHRM") presents this brief in support of Seagate Technology, Inc.'s Petition for a Writ of Certiorari.[1]

SHRM is an international organization designed to equip human resources professionals as leaders and decision-makers within their organizations. SHRM represents the interests of approximately 104,000 members in all 50 states and in 18 countries. SHRM's members are responsible for making daily employment decisions affecting tens of millions of applicants and employees.

SHRM is filing a brief in this case because the split among the circuits on the standard for summary judgment in disparate treatment employment discrimination cases affects its members' abilities to make employment decisions based on merit, ability, and other legitimate bases. The "no evidence" summary judgment standard, which allows applicants and employees to avoid summary judgment without presenting legally sufficient evidence of intentional discrimination at the summary judgment stage, chills this ability because in "no evidence" circuits, the federal courts are able to apply hindsight to second guess employers' decisions. As a result, juries become "super personnel departments" reviewing human resources professionals' business judgment. The approach dictated by this Court in

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[1] Counsel for SHRM, Thomas H. Lawrence, certifies pursuant to Supreme Court Rule 37.6 that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

its *St. Mary's Honor Center v. Hicks* decision is better. Applying *Hicks*, human resources professionals can make personnel decisions based upon the facts then known, with the assurance that a mere denial of those facts will not be legally sufficient to void those good faith decisions.

Resolving the split among the circuits and providing guidance to SHRM's membership and the other human resources professionals in the United States regarding the applicable summary judgment standard will enable SHRM to more readily educate its membership on their human resources roles and avoid a patchwork scheme of decision-making oversight by federal courts. Failure to resolve the split will likely encourage businesses to consider "circuit geography" in making relocation decisions.

This brief is filed with the consent of both parties, and letters reflecting this consent have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

There is a clear split among the federal courts of appeals on the precise issue presented by this petition – the appropriate standard for summary judgment in disparate treatment employment discrimination cases.[2] The First

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[2] *Compare Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996) (*en banc*); *Aka v. Washington Hospital Center*, No. 96-7089, 1998 U.S. App. LEXIS 24929 (D.C. Cir. Oct. 9, 1998) (*en banc*); *Weisbrot v. Medical College of Wisconsin*, 79 F.3d 677, 682, n.5 (7th Cir. 1996); *Randle v. City of Aurora*, 69 F.3d 441, 453, n.17 (10th Cir. 1995) (*en banc*); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997), *cert.*

Circuit, Second Circuit *en banc*, Fifth Circuit *en banc*, and Eighth Circuit *en banc* hold that this Court's opinion in *St. Mary's Honor Center v. Hicks*[3] requires an employee to raise a genuine issue of material fact regarding intentional discrimination in order to survive an employer's motion for summary judgment. The Third Circuit *en banc*, the District of Columbia Circuit *en banc*, the Seventh Circuit, the Tenth Circuit *en banc*, and the Eleventh Circuit disagree. These latter circuits hold that an applicant or employee may avoid summary judgment merely by raising a genuine issue of material fact as to pretext even if there is no accompanying evidence of intentional discrimination.

All circuits concede that *Hicks* requires an applicant or employee to prove intentional discrimination to win at trial. It follows that to survive summary judgment, an applicant or employee must produce evidence sufficient to raise a genuine issue of material fact as to intentional discrimination. Fed. R. Civ. P. 56. While evidence tending to show pretext may sometimes be sufficient to raise an

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denied, 118 S. Ct. 685 (1998) (following the "pretext only" interpretation of *Hicks*, which is referred to herein as the "no evidence" approach) *with Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994); *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (*en banc*), *cert. denied*, 118 S. Ct. 851 (1998); *Rhodes v. Guiberson Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*), *cert. denied*, 502 U.S. 868 (1997); *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir.), *cert. denied*, 117 S. Ct. 2510 (1997) (requiring that a plaintiff present, at the very least, some evidence of intentional discrimination in order to avoid summary judgment).

[3] 509 U.S. 502 (1993).

issue of material fact as to discrimination, this certainly is not always the case.

Since 1993, this "no evidence" reading of *Hicks* has taken hold in several circuits. The confusion has developed into a major split in the circuits, including conflicting *en banc* circuit decisions.

The Courts of Appeals – like the Tenth Circuit – that allow "no evidence" cases to proceed beyond the summary judgment stage are, in effect, overturning this Court's decision in *Anderson v. Liberty Lobby*[4] by allowing plaintiffs to avoid summary judgment without creating a material factual dispute on intentional discrimination, a necessary element which plaintiffs must ultimately prove at trial.[5] This confusion has created uncertainty, post-*Hicks*, in the interplay between the *McDonnell Douglas/Burdine*[6] burden shifting analysis and summary judgment practice under *Anderson*.[7] Allowing this modification in the

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[4] 477 U.S. 242 (1985).

[5] *Id.* at 252.

[6] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

[7] Thomas Duley, Comment, *Summary Judgment and Title VII After Hicks: How Much Evidence Does It Take to Make an Inference?*, 28 U.C. DAVIS L. REV. 261, 275-76 (1994) (stating that "two interpretations of *Hicks* have confused courts' rulings on employers' summary judgment motions"); Richard L. Alfred & Michael D. Ricciuti, *Burden of Production and Proof in Employment*

summary judgment standard risks requiring a jury trial in every disparate treatment employment discrimination case in the "no evidence" circuits.

The question raised by this petition potentially arises in thousands of discrimination cases each year. Employment discrimination cases are among the most common types of federal civil cases. Summary judgment plays a crucial role in allocating judicial and economic resources in these cases. That six Courts of Appeals have held *en banc* hearings on this issue proves its importance. Only this Court can resolve the existing circuit split.

Discrimination Cases: An Endangered Future for Summary Judgment Motions?, 38 BOSTON B.J. 7, 21-22 (1994) (indicating confusion regarding evidence necessary to preclude summary judgment in Title VII cases); Jody H. Odell, Comment, *Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and its Application to Summary Judgment*, 69 NOTRE DAME L. REV. 1251, 1267-73 (1994) (setting forth two alternative interpretations of *Hicks* regarding sufficiency of pretext evidence).

ARGUMENT

I. The Court should grant the petition to resolve a split among the federal courts of appeals, including *en banc* decisions.

A. The federal courts of appeals are split over the standard for summary judgment in disparate treatment cases.

In *St. Mary's Honor Center v. Hicks,* this Court wrote the following passage:

> The factfinder's disbelief of the reasons put forward by the defendant ... may, together with the elements of the prima facie case, suffice to show intentional discrimination.[8]

Commentators have recently examined the sharp division among the circuits over this passage and the devastating impact this division is having, and will continue to have, on summary judgment practice in employment discrimination cases:[9]

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[8] 509 U.S. 502, 511.

[9] *See* R. Alexander Acosta and Eric J. Von Vorys, *Bursting Bubbles and Burdens of Proof: Disagreements on the Summary Judgment Standard in Disparate Treatment Employment Discrimination Cases*, 2 TEX. REV. LAW AND POL. 207 (Spring 1998) [hereinafter *Bursting Bubbles*] ("An ambiguous sentence in *Hicks*, ironically, has created a new circuit split regarding the amount of evidence that an employee must present in order to survive an employer's

> This passage might mean that the factfinder is always free to infer intentional discrimination from evidence that establishes a *prima facie* case and raises an issue of fact concerning the veracity of the proffered reasons. It might also mean, however, that a factfinder is enabled, only in appropriate cases, to infer intentional discrimination from this evidence.
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> * * *
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> The difference between these two meanings is substantial. Under the former meaning, an employment discrimination case will always proceed to trial if the employee raises a genuine issue of fact regarding the veracity of the employer's proffered reason. This is not difficult to do. A district court could not, based on sufficiency of the evidence, grant an employer's motion for judgment and the appellate court could not review the factfinder's verdict for sufficiency of the evidence. Under the latter meaning, however, a district court could ask whether the evidence taken as a whole could support a finding of intentional discrimination. If it does not, the district court could enter judgment in favor of the employer.[10]

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motion for summary judgment or judgment as a matter of law.").

[10] *Id.* at 209.

The division among the circuits on this substantial issue is pervasive. The Third Circuit (in a ten to one decision),[11] the District of Columbia Circuit (in a seven to four decision)[12] the Seventh Circuit,[13] the Tenth Circuit (in a panel decision unanimously adopted by the *en banc* court),[14]

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[11] *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996) (*en banc*) ("[A] plaintiff may survive summary judgment (or ... judgment as a matter of law) if the plaintiff produced sufficient evidence to raise a genuine issue of fact as to whether the employer's reasons were not its true reasons for the challenged employment action."), *cert. denied*, 117 S. Ct. 2532 (1997).

[12] *Aka v. Washington Hospital Center,* No. 96-7089, 1998 U.S. App. LEXIS 24929, *17 (D.C. Cir. Oct. 9, 1998) ("we therefore reject any reading of *Hicks* under which employment discrimination plaintiffs would be routinely required to submit evidence over and above rebutting the employer's stated explanation in order to avoid summary judgment.").

[13] *Weisbrot v. Medical College of Wisconsin*, 79 F.3d 677, 682, n.5 (7th Cir. 1996) (reviewing the competing interpretations of *Hicks* in other circuits and reaffirming its position).

[14] *Randle v. City of Aurora,* 69 F.3d 441, 453, n.17 (10th Cir. 1995) (*en banc*) ("[A] civil rights plaintiff may withstand a motion for summary judgment and is entitled to present his claim to the factfinder if the plaintiff establishes a *prima facie* case and presents evidence that the defendant's proffered nondiscriminatory reason was pretextual, *i.e.*, unworthy of belief.").

and the Eleventh Circuit[15] have adopted the former interpretation. These circuits place no burden on plaintiffs to demonstrate the existence of a material issue of fact as to intentional discrimination at the summary judgment stage. In contrast, the First Circuit,[16] the Second Circuit *en banc*,[17] the Fifth Circuit *en banc*,[18] and the Eighth Circuit *en banc*[19] have adopted the latter view.

The "no evidence" rule is incorrect in light of this Court's opinion in *Hicks*. *Hicks* holds that the plaintiff at all times retains the ultimate burden of proof as to intentional discrimination.[20] The "no evidence" rule, as Judge Tacha explained below in her dissent in this case, is especially troubling because it modifies the summary judgment standard dictated by this Court:

> This Circuit's treatment of pretext evidence has inappropriately circumscribed district

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[15] *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998).

[16] *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994).

[17] *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (*en banc*), *cert. denied*, 118 S. Ct. 851 (1998).

[18] *Rhodes v. Guiberson Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*), *cert. denied*, 502 U.S. 868 (1997).

[19] *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir.), *cert. denied*, 117 S. Ct. 2510 (1997).

[20] 509 U.S. at 508.

> courts' powers under Rule 56 . . . . I believe the proposition that an employer can never succeed at summary judgment upon a showing of pretext is inconsistent with Rule 56 and is not, as we have presumed, dictated by Supreme Court precedent.[21]

A simple example shows the problem with the "no evidence" standard. An employee who is within a protected class of employees under Title VII is disliked by his supervisor solely because of personal reasons. The supervisor knows that he cannot request that the human resources department terminate the employee because of the supervisor's personal animosity, so the supervisor harshly grades the employee's performance, places the employee on a performance improvement plan, and ultimately terminates the employee for performance reasons.

The employee files a lawsuit against the employer and submits affidavits from former co-employees that he was performing at the same level as these other employees who were still employed. He also presents evidence that the real reason for the termination was the supervisor's personal animosity and not poor performance. But he submits no

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[21] *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1176 (10th Cir. 1998); *see Aka,* 1998 U.S. App. LEXIS 24929, at *100 (Henderson, J., dissenting) ("To survive summary judgment, the plaintiff must always produce independent evidence of discrimination. Only if we require such a showing do we preserve the plaintiff's congressionally mandated burden to show that the employer's real reason for its personnel decision was discrimination on the basis of the plaintiff's membership in a protected class.").

evidence that intentional discrimination was the real reason for the termination.

Thus, the employee has presented evidence that the employer's stated non-discriminatory reason is false (*i.e.*, pretextual). Under *Hicks*, this employee's case should not survive summary judgment. The employee's case would survive summary judgment in a "no evidence" circuit, however, despite the fact that the employer has presented no legally sufficient evidence that his termination was based upon intentional discrimination.

B. The *Beaird* decision below turns on the resolution of this split.

The only evidence presented in *Beaird* below was evidence of pretext. This evidence, the panel majority held, required reversing the district court's entry of summary judgment because under the Tenth Circuit's "no evidence" standard, a genuine issue of material fact as to pretext necessarily precludes summary judgment.

The dissent would have rejected the "no evidence" approach and would instead have required plaintiffs to raise a genuine issue of material fact as to intentional discrimination. Sometimes, the dissent noted, this may be done solely by evidence of pretext when "the pretextual evidence [is] of a nature or quality from which a reasonable jury could infer illegal discrimination."[22] That was not the case in *Beaird*, however.

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[22] *Beaird*, 145 F.3d at 1169.

II. This Court should grant the petition to resolve this multi-circuit split concerning an important and recurring question of federal law.

The standard of proof necessary to avoid summary judgment is a critical issue in every disparate treatment employment discrimination case.

Employment discrimination cases are the most common type of case filed in federal courts, with the exception of criminal and prisoner-related cases.[23] This burgeoning area of federal litigation is growing at a rapid pace. During the 12-month period ending March 31, 1993, employment discrimination filings numbered 11,725.[24] For the same period ending in 1997, the number had soared to 23,547.[25] These figures do not include employment discrimination cases filed in state courts under state laws that mirror Title VII. Clarifying the summary judgment standard in pretext cases will also impact large numbers of state court cases because many – if not most – state courts pattern their summary judgment practice on federal practice.

There is every indication that this trend will continue, and possibly increase at an even more accelerated pace, if the split is not resolved. For example, since 1993, when *Hicks* was decided, 425,330 charges of discrimination

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[23] *See Judicial Business of the United States Courts*, at tbl. C-2A (Administrative Office of the Courts 1998).

[24] *Id.*

[25] *Id.*

have been filed with the EEOC.[26] The EEOC openly acknowledges that it follows the "no evidence" reading of *Hicks* by making cause findings in every case in which a charging party raises a question as to pretext, even if the charging party has only stated a *prima facie* case and raised a question as to pretext.[27] The EEOC believes that "[this] Court agreed with the Eighth Circuit's conclusion that no other proof is required when the fact finder rejects the defendant's reasons."[28]

As a result, it is reasonable to assume that the federal court system will be inundated with new cases in every circuit if a charging party merely challenges the employer's proffered reason for a job action, even if the particular circuit disagrees with the EEOC's reading of *Hicks*.[29]

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[26] The U.S. Equal Employment Opportunity Commission, *Charge Statistics FY 1991 through FY 1997*, <http://www.eeoc.gov/stats/charges.html>.

[27] *EEOC Enforcement Guidance on St. Mary's Honor Center v. Hicks*, EEOC Compl. Man. (BNA) ¶ 2099 (Apr. 12, 1994) (emphasis added).

[28] *Id.*

[29] *See, e.g.*, *Woods*, 30 F.3d at 260 n.3 ("The EEOC would like a blanket statement that once evidence of pretext is proffered, that evidence along with the prima facie case will at all times shield plaintiff from adverse summary judgments.").

Summary judgment plays a crucial role in discrimination cases.[30] It prevents non-meritorious suits from proceeding to trial.[31] At the same time, it saves litigants and the judicial system substantial costs. In testimony before Congress eight years ago, the U.S. Chamber of Commerce explained how substantial the cost of defending a case through trial can be for employers:

> [e]xperience has shown that the average cost of defending a single plaintiff employment discrimination action through trial can be between $100,000 and $150,000, and often it is much more.[32]

Because of the large number of discrimination cases, improper application of the summary judgment standard leads to a substantial waste of judicial resources.[33] This error is magnified in the employment discrimination context.

In 1994, 4,330 civil cases were tried to federal court juries.[34] Of those cases, 477 – or 11% – were employment

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[30] *Bursting Bubbles*, *supra* note 8, at 209.

[31] *Id.* at 210.

[32] *The Civil Rights Act of 1996: Hearings on S.2104 Before the Senate Committee on Labor and Human Resources*, 136 Cong. Rec. S.3144, 101st Cong.; 2nd Session (1990) (Statement of James C. Paras, Esq.).

[33] *Id.*

[34] *Judicial Business of the United States Courts*, at tbl. C-2A (Administrative Office of the Courts 1998).

cases.[35] By 1998, the total number of civil cases tried to juries remained stable, at 4,361.[36] The number of those cases that were employment cases, however, has exploded to 912, or 20.9%.[37]

Concern over this explosion was echoed recently by commentators discussing the post-*Hicks* "no evidence" circuit split in summary judgment cases:

> The effect is that district courts in these ["no evidence"] circuits, as a practical matter, are precluded from granting an employer's motion for judgment based upon sufficiency of the evidence.[38]

CONCLUSION

The split among the circuits is causing litigants and courts to spend substantial monetary and judicial resources managing employment discrimination cases in "no evidence" circuits.

The lower courts and employers urgently require guidance from this Court to resolve the split. The circuits that essentially apply a "per se jury trial rule" in employment discrimination cases are incorrect in relying on this Court's decision in *Hicks* to support that rule. This

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Bursting Bubbles*, *supra* note 8, at 207.

Court should grant Seagate's Petition and resolve the split among the circuits.

Respectfully submitted,

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